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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EARL MONROE BELCHER, Defendant and Appellant.	G054415 (Super. Ct. No. 14NF1018) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed as modified.

Cynthia Grimm, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

In 2016, a jury convicted defendant Earl Monroe Belcher of a 1995 forcible rape (Pen. Code § 261, subd. (a)(2); all statutory references are to the Penal Code unless stated otherwise), and found true an allegation the rape was committed during the commission of a burglary (§§ 459, 667.61, subds. (b) & (e)(2);) The jury also found the prosecution was timely within the meaning of section 803, subdivision (g)(1). In a bifurcated bench trial, the court found six prior strike allegations were true. Defendant was sentenced to an indeterminate term of 15 years to life, which was tripled pursuant to the "Three Strikes" law to 45 years to life.

On appeal, defendant raises a host of issues in 271 pages of briefing. He claims:

(1) The trial court prejudicially erred by admitting testimony regarding forensic DNA evidence taken from the rape victim in 1995 because there were gaps in the chain of custody of the biological evidence between its collection and first analysis in 1995, between 1995 and its second analysis in 2002, and between 2002 and its final analysis in 2014. He further claims these gaps resulted in a conviction based on insufficient evidence.

(2) The trial court prejudicially erred by admitting some of the now deceased rape victim's hearsay statements to her daughter made soon after the crime.

(3) Defense trial counsel was ineffective for failing to object to a crime scene investigator's testimony the rape victim pointed out her assailant's point of entry into her home and to the bed where she was raped.

(4) The prosecutor's closing argument prejudiced defendant by telling jurors to use their common sense and life experience in their deliberations, and in how she explained reasonable doubt. Alternatively, defense counsel was ineffective for failing to object to these portions of the prosecutor's closing arguments.

(5) The trial court prejudicially erred by giving CALCRIM No. 1190, which tells a jury a sexual assault conviction may be based on the testimony of a single

witness, because it did not apply in this case. Further, the court should have defined the term "complaining witness" as used in the instruction. Lastly, CALCRIM No. 1190 should not have been given in conjunction with CALCRIM No. 301, since both instructions discuss analyzing the testimony of a single witness.

(6) The cumulative effect of these purported errors resulted in a fundamentally unfair trial.

(7) Three of defendant's prior strike conviction findings must be stricken and the matter remanded for resentencing.

We reject the first six of defendant's claims and affirm his rape conviction and sentence. The Attorney General concedes three of defendant's strikes must be stricken because the convictions in those matters occurred *after* the rape in this case. Simply put, they are not *prior* convictions. We accept the concession. Nonetheless, the matter need not be remanded for resentencing because the remaining three strike priors *did* occur prior to the 1995 rape in this case, defendant does not challenge those priors, and it is pellucid on this record the trial court would not impose a different sentence were the case to be remanded.

FACTS

In May 1995, 74-year-old Gretchen Fisher[1] lived alone at her home in Fullerton. Her daughter, Mary Fisher, testified her mother telephoned and told her she was sitting in her living room that night when a man came through a bedroom window adjacent to the living room. He told Gretchen he had been to every other window but found them locked, and used the only unlocked window he could find to make his entry. The man told Gretchen he wanted money, but she only had a few dollars in her wallet. Although she never saw one, he told her he had a gun, making Gretchen feel she would be murdered and that she had to do anything he told her to do. The man then raped her

[1] We refer to the Fishers by their first names to avoid confusion; we intend no disrespect.

on her bed in her bedroom. After being raped, Gretchen drove the man to a nearby ATM machine, withdrew $40, gave it to him, and then dropped him off in a nearby parking lot. Once home, Gretchen called Mary and told her what had happened.

Police were called and took Gretchen to the hospital. Dr. Michael Martin examined Gretchen and took vaginal swabs. He microscopically examined a portion of her vaginal fluid and found sperm. Martin also observed two abrasions to Gretchen's vaginal area indicative of trauma.

Nurse Jeannene Sutton assisted Martin that night. In sexual assault cases, it was Sutton's standard practice to take the vaginal swabs from the physician and place them in separate envelopes that were part of a special "rape kit." Sutton also drew a blood sample from Gretchen, another standard practice in sexual assault cases. In addition, Sutton took an oral DNA swab from Gretchen's cheek and placed it in a special tube provided in the kit.

Based on her review of the 1995 medical records and her standard practices and procedures, Sutton testified she had taken the samples and swabs, sealed them, labeled them, and placed them in a large envelope together with a five-page medical examination chart she and Martin filled out during the examination. Sutton sealed this envelope and kept it until police took custody of it from her later that night. At trial, Sutton identified the label she had placed on the large envelope in 1995. She further testified that if there was anything out of the ordinary with a particular rape kit, she would not use it and would instead ask the police for another one.

Susan Thompson, a crime scene investigator for the Fullerton Police Department (FPD), testified she collected Gretchen's rape kit from Sutton at the hospital. Thompson took the envelope, placed it in a brown paper bag, sealed the bag, and booked it into evidence. Thompson testified her standard practice was to place evidence she collected in such a brown paper bag, and label the bag with the Fullerton police case number, the date and the time. She would then seal the bag with red tape, and also place

red tape over the label. According to records she reviewed, it was the only rape kit she picked up that night. Once she arrived at the police department, Thompson placed the sealed rape kit in a special locked refrigerator, to which only two or three police employees had keys.

Before collecting the rape kit at the hospital, Thompson spoke to Gretchen at the crime scene. In an attempt to locate possible latent fingerprints, at Thompson's request Gretchen pointed out which window the man entered and any areas he may have touched. No fingerprints were found. Thompson also collected a quilt from Gretchen's bed, made castings for footprints outside the house, and photographed all the possible points of entry.

Forensic scientist Edward Buse from the Orange County Sheriff's Department crime lab (the crime lab) testified that in May 1995 he examined and tested the sealed rape kit in this case, using a no longer used process known as "RFLP." He unsealed and examined the contents of a manila envelope bearing the same Fullerton police case number Thompson had testified to.

Inside the rape kit, Buse found another sealed envelope labeled "vaginal swab" and inside were four swabs. Examining one vaginal swab, he separated the sample into sperm and nonsperm fractions, and created a DNA profile for each. He also created a DNA profile from Gretchen's blood sample as a reference. The blood sample profile matched the nonsperm fraction profile of the vaginal swab sample. The sperm fraction profile did not match any DNA profile from the then current databases, but was logged and kept for future reference. Buse transferred his fractions to separate tubes, which he sealed and labeled with internal crime lab numbers for storage and future analyses.

By 2001, newer DNA technology polymerase chain reaction (PCR) was in use. It was simpler, more sensitive, and needed only small amounts of DNA to successfully analyze a sample. In February 2002, forensic scientist Richard Gustilo was assigned to review the current case. Gustilo did not use Buse's earlier RFLP profiles, but

instead ran separate PCR testing. Although he had read Buse's reports from 1995, he did not rely on them or their results in his testing or in coming to his PCR based conclusions.

Like Buse earlier, Gustilo also found the nonsperm fraction matched Gretchen's blood sample. In the sperm fraction, he found a small amount of Gretchen's DNA. The major contributor in the sperm fraction was an unknown male, but again there was no match in the then available databases. The new PCR profile was uploaded into CODIS,[2] a nationwide DNA database.

Gretchen died in March 2007.

In 2013, there was a CODIS "hit" and the crime lab received a letter from the State of Nevada advising defendant's DNA may match that of the unknown male in this case. In January 2014, a DNA sample was taken from the defendant in a Nevada prison. In February, the crime lab obtained the sample, and prepared a profile. The parties stipulated to the taking of defendant's DNA sample as well as the sample's chain of custody from the swab of defendant's cheek in Nevada to a crime lab storage locker only accessible to the crime lab's forensic scientists. In addition, it was stipulated defendant's sample was properly collected, sealed, labeled, and stored.

When Gustilo retrieved defendant's Nevada DNA swab from the storage locker, it was in a sealed envelope marked with the same Fullerton police case number. Gustilo compared it to the sperm fraction taken from Gretchen's vaginal swab. It matched. The population frequency, or how often a particular DNA profile would be found in the world's population, was more than one in one trillion.

The defense offered no evidence and defendant did not testify.

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[2] CODIS is the acronym for the Combined DNA Index System and is the generic term used to describe the FBI's program of support for criminal justice DNA databases as well as the software used to run these databases. (See <https://www.fbi.gov/services/laboratory/biometric-analysis/codis> [as of Apr. 15, 2019].)

DISCUSSION

1. Chain of Custody

Defendant contends his rights to due process and a fair trial were violated by the trial court's admission of the DNA evidence without adequate evidentiary foundation. Specifically, he maintains the prosecution failed to establish a sufficient chain of custody for the forensic evidence from the FPD evidence refrigerator to the crime lab in 1995. Similarly, he challenges the intervening chain of custody within the crime lab from its initial 1995 testing to its second 2002 analysis, and from its 2002 testing to its final comparison in 2014. Defendant does not challenge the chain of custody of the evidence from the hospital to the FPD. He acknowledges Thompson's testimony in this regard establishes this link in the chain, and instead insists "the chain of custody ends at the FPD."

A. Legal Background

A trial court's exercise of discretion in admitting evidence is reviewed on appeal for an abuse of discretion. (*People v. Catlin* (2001) 26 Cal.4th 81, 134 (*Catlin*).) "In determining the admissibility of evidence, the trial court has broad discretion." (*People v. Williams* (1997) 16 Cal.4th 153, 196.) We will not disturb a trial court's determination of what evidence is admissible absent a clear showing of abuse of discretion. (*County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1448.) Thus, we may only overturn a trial court's exercise of discretion if it is "arbitrary, capricious, or patently absurd resulting in a manifest miscarriage of justice." (*People v. Williams* (2009) 170 Cal.App.4th 587, 606.)

It is axiomatic that not every link in an evidential chain of custody must be established. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 311, fn. 1 (*Melendez-Diaz*).) Thus, "it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While . . . '[i]t is the

obligation of the prosecution to establish the chain of custody,' . . . this does not mean that everyone who laid hands on the evidence must be called. . . . '[G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' [Citation.]" (*Ibid.*)

When a chain of custody objection is made, '"'"[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]'" (*Catlin, supra,* 26 Cal.4th at p. 134; see Méndez, Cal. Evidence (1993) § 13.05, p. 237 ["While a perfect chain of custody is desirable, gaps will not result in the exclusion of the evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering"].)

B. Analysis and Application

Defendant highlights the prosecution's failure to trace precisely what happened to the forensic evidence after its arrival at FPD, its delivery to the crime lab, and the interim periods between its analyses in 1995, 2002 and 2014. He also questions the integrity of defendant's Nevada DNA swab following its arrival at the crime lab and its analysis by Gustilo a month later. The issue before us is whether these partially incomplete or missing connections are "vital," or whether they only raise speculative concerns. (*Catlin, supra,* 26 Cal.4th at p. 134.)

To support his claim, defendant analogizes to *People v. Jimenez* (2008) 165 Cal.App.4th 75 (*Jimenez*), a case we find inapt. In *Jimenez,* the defendant was convicted

of robbing a bank, and the issue was whether the trial court had erred in admitting DNA evidence and a criminalist's accompanying testimony.

After robbing the bank, a man fled on a bicycle and abandoned it nearby. A criminalist compared DNA found on the handlebars of the bicycle with a reference sample supposedly taken from the defendant after an earlier arrest, and testified the probability that anyone but the defendant left the DNA on the bicycle was extremely low. (*Jimenez, supra,* 165 Cal.App.4th at p. 79.) Two other witnesses—a police sergeant and the chief investigating officer—testified on the issue of the chain of custody of the reference sample, although not the forensic evidence taken from the bicycle. The sergeant testified that in the earlier case, in accordance with the chief investigating officer's directive to have DNA swabs taken from the defendant following his arrest, he "made arrangements with an identification bureau technician [] to do so. . . ." (*Ibid*.) "[The sergeant] testified—conclusorily—that [the technician] did so. The sergeant testified ambiguously that either he or the chief investigating officer—he did not specify who—gave instructions to someone — he did not specify to whom—for the swabs to be sent to DOJ [the Department of Justice]. The sergeant testified—conditionally—that the swabs 'would have been properly labeled.' He did not testify at all about the basis—whether personal observation, hearsay, or conjecture the record is silent—of his testimony that [the technician] took the swabs." (*Ibid*.) The technician did not testify, and "the sergeant did not testify that the technician preserved and labeled the specimen, did not testify that the technician was directed to send the sample to DOJ, did not testify that the technician or anyone else ever sent the sample to DOJ, and did not testify that the technician processed, labeled, or stored the sample." (*Id*. at pp. 79-80.)

"The chief investigating officer testified that he requested DOJ comparison of the handlebar swabs with the cheek swabs and, over [defendant's] foundational objections, that he received a report showing that the comparison 'had occurred.' Though abundantly clear about his own request, the chief investigating officer's

testimony was conspicuously silent about the evidence on which the accuracy of the DOJ report was completely dependent. [¶] Over [defendant's] foundational objections, the DOJ criminalist testified that he received from the police department two properly packaged and preserved swabs with paperwork that referred to [defendant] and that showed the submitting party was a detective who did not testify at trial [and] the recorded booking officer was the technician who did not testify at trial. . . ." (*Jimenez, supra*, 165 Cal.App.4th at p. 80.)

The *Jimenez* court held: "The woefully inadequate chain of custody here raises grave concerns about whether the reference sample with which the criminalist compared the handlebar swabs came from [defendant's] cheek or from some altogether different source with no connection to him at all. [¶] . . . [¶] Here, the chain of custody amounts to nothing more than a link here, a link there, with little more than speculation to connect the links into a chain. The requisite showing of a reasonable certainty that there was no substitution is but a chimera. Serious questions arise about what, if anything, the reference sample has to do with [defendant]." (*Jimenez, supra*, 165 Cal.App.4th at p. 81.)

Jimenez is inapposite. There the technician who supposedly obtained the reference sample did not testify; the police sergeant testified "conclusorily" that the technician took the swabs but he did not testify as to how he knew she did so; and the sergeant also did not testify as to the processing of the sample, or whether the technician, or anyone else, transported the sample to the DOJ. The record contained virtually no evidence as to the processing and transportation of the reference sample or by whom.

Here, by contrast, the parties stipulated to defendant's DNA sample as well as his sample's chain of custody from defendant's cheek to a crime lab storage locker. In addition, it was further stipulated defendant's sample was properly collected, sealed, labeled, and stored. When Gustilo analyzed the sample taken from defendant in Nevada, he took it from a sealed envelope labeled with the appropriate FPD case number. Thus,

unlike *Jimenez*, there is no real question as to where and from whom the reference sample came, or who tested it. Furthermore, the consistent case number labeling provides confirming circumstantial evidence of its authenticity and disconfirms any speculation of tampering.

As for the 1995 forensic samples taken from Gretchen, Martin and Sutton testified to taking the vaginal swabs and blood sample, and how they were secured in the rape kit package. Sutton further testified she kept the kit until she personally gave it to Thompson. Thus, unlike *Jimenez*, where the court found the police witnesses' testimony inadequate, here "[m]edical personnel presumably have no 'skin in the game' when collecting biological samples: they have no incentive to alter evidence. Thus, [samples taken] in a hospital environment by medical personnel, as opposed to in a police station by [a] police technician[], substantially lessens the basis for any suspicion that a sample has been substituted." (*People v. Hall* (2010) 187 Cal.App.4th 282, 296 (*Hall*).)

More importantly, unlike *Jimenez* where the significant evidence was collected by police technicians *after* the defendant had become a suspect, here a nurse sealed the DNA evidence in the sexual assault kit at a time when no suspect had been identified and defendant was not in custody. Thus, no one would have had reason—or opportunity—to contaminate the sexual assault kit evidence with defendant's DNA because defendant's DNA sample was not obtained until almost twenty years later.

In turn, Thompson testified she took the kit from Sutton, sealed it in a separate evidence bag, ran tape across it, and labeled it with the FPD case number, date and time. She then personally placed the sealed envelope in a locked evidence refrigerator at the police station.

Buse explained the procedures in Orange County for how police departments request forensic analyses by the crime lab, and how evidence normally gets from a police department to the crime lab. Although he was unable to testify who from the police station brought the rape kit to the crime lab, he explained that all police

property officers are trained in how to store and preserve property and described the protocols for transportation. It is reasonable to infer an official duty has been regularly performed unless there is some evidence to the contrary. (*People v. Lugo* (1962) 203 Cal.App.2d 772, 775; *Hall, supra*, 187 Cal.App.4th at p. 296; Evid. Code, § 664 ["It is presumed that official duty has been regularly performed"].)

Thus, unlike *Jimenez,* where no evidence was provided to show the protocols followed by the police department and the DOJ crime lab, Buse and Gustilo both gave detailed testimony as to the procedures police departments and crime lab staff had been trained to follow when collecting forensic samples and submitting them to the crime lab for analysis. Both also testified as to the procedures the crime lab had in place for internally transporting, storing, and analyzing forensic evidence. Defendant points to nothing showing the FPD, the hospital staff, or the crime lab personnel failed to perform their duties as regularly performed. Indeed, here defendant offers only unspecified possibilities, i.e., speculation.

Buse testified he examined a still sealed rape kit, with small envelopes inside a larger envelope. He also explained how he retrieved a tube with a blood sample in it from the crime lab, again bearing the crime lab evidence control number, confirming he opened the same rape kit Sutton earlier sealed. Gustilo testified to crime lab protocols in effect at the time he did his testing, and again defendant points to no evidence suggesting these protocols were not followed in this case, either at the FPD or the crime lab. (Evid. Code, § 664.) Significantly, both forensic scientists consistently testified all envelopes they examined were properly sealed and labeled with the same case reference number. Unlike *Jimenez*, where the only evidence provided regarding the processing and transportation of the sample was conclusory and ambiguous, the sequence of events to which Thompson, Buse and Gustilo testified here "'connect[s] the evidence with the case and raise[s] no serious questions of tampering'" (*Catlin, supra,* 26 Cal.4th at p. 134.)

The chain of custody reflected here is not perfect and after 20 years there are gaps. But this case is not *Jimenez*. Rather, it is more akin to the seminal case of *People v. Riser* (1956) 47 Cal.2d 566 (*Riser*), disapproved on other grounds in *People v. Chapman* (1959) 52 Cal.2d 95, 98, and *People v. Morse* (1964) 60 Cal.2d 631, 648.

In *Riser,* the husband and wife proprietors were shot and killed during a robbery of their cafe. Two men came into the cafe and sat on stools at the end of the bar, away from the other customers, and ordered beers. After ordering a second round, one of the two rose from his stool, drew a gun, and announced "This is a stick-up." The other man, who was also armed, silently took a position by the front door, while his companion went behind the bar where the proprietors were. In an attempt to foil the robbery, the husband seized a bottle and attacked the gunman. In the ensuing struggle, he was struck several times and shot. The gunman then shot and killed the wife, apparently as she was trying to reach a gun. (*Riser, supra*, 47 Cal.2d at p. 572.)

On chain of custody grounds, the defendant challenged the admission into evidence of a beer bottle and a glass bearing fingerprints an analyst testified were the defendant's. A sheriff's deputy identified the bottle and glass as items he had taken from the crime scene. He had dusted them for fingerprints, put them in a box, and locked the box in the sheriff's identification truck. Later, he returned to the sheriff's office and put them in an open bookcase in an unlocked office he shared with another police officer. This office was flanked on one side by an office shared by two or three persons, and on the other side by a hall leading to a general office. The evidence remained in the book case approximately four hours, when it was removed and thereafter kept under lock and key or in the custody of specific persons. (*Riser, supra*, 47 Cal.2d at pp. 579-580.)

On appeal, the defendant contended "that in view of these facts the prosecution failed to establish continuous possession, which is a necessary foundation for the admission of demonstrative evidence; that since someone could have altered the prints or imposed wholly new ones during the four hours the glass and bottle were left

unguarded in the book case, the prosecution has not sufficiently identified the prints as those that existed when the articles were removed from the [cafe]." (*Riser, supra*, 47 Cal.2d at p. 580.) The court rejected the defendant's claim a proper chain of custody requires the prosecution to negative all possibility of tampering. "Undoubtedly the party relying on an expert analysis of demonstrative evidence must show that it is in fact the evidence found at the scene of the crime, and that between receipt and analysis there has been no substitution or tampering [citation], but it has never been suggested by the cases, what the practicalities of proof could not tolerate, that this burden is an absolute one requiring the party to negative all possibility of tampering. [Citations.]" (*Ibid.*) Since "[the] defendant did not point to any indication of actual tampering, did not show how fingerprints could have been forged, and did not establish that anyone who might have been interested in tampering with the prints knew that the bottles and glasses were in [the deputy's] book case . . . [t]here was no error in the court's ruling." (*Id.* at p. 581.)

So too here. Defendant does not point to any indication of actual tampering, does not show how the forensic evidence could have been compromised, and does not establish that anyone who might have been interested in tampering with the evidence even knew where the evidence was located, let alone had access to it. (*Riser, supra*, 47 Cal.2d at p. 581.) The *Riser* court concluded the prosecution is not required to negate all possibility of tampering and upheld the trial court's ruling. (*Id.* at p. 580.) And, like the defendant in *Riser*, defendant here fails to show the FPD and crime lab scientists failed to perform their duties. Instead, his allegations raise only the "barest speculation" that Gretchen's DNA swabs were tampered with while in the custody of law enforcement. (*Id.* at p. 581.) Because there is no evidence of tampering, much less any evidence that any of the officers involved had a history of dishonesty in handling evidence or a motive to frame a defendant sitting in a Nevada prison who was unidentified for almost 20 years, his chain of custody objection boils down to nothing more than conjecture.

Thus, here "the trial court properly concluded that the prosecution had made at least a prima facie showing that the evidence had not been tampered with . . . [and] did not err in admitting the evidence, permitting the jury to hear all of the facts and circumstances surrounding its" collection and analyses, "and requiring the jury to find beyond a reasonable doubt that [the evidence] had not been tampered with before considering it." (*People v. Williams* (1989) 48 Cal.3d 1112, 1135.) There was no abuse of discretion.

C. Substantial Evidence Supports the Forensic DNA Was Defendant's

In an ancillary claim, defendant insists there is insufficient evidence he is the individual who raped Gretchen because the only evidence identifying him as the perpetrator is the DNA evidence he claims should have been excluded due to the purportedly inadequate chain of custody foundation. His support for this somewhat circular argument, however, is to reiterate his previous claims regarding the chain of custody foundation; premises we have already rejected. His sufficiency argument is essentially a claim that, with the gaps in the chain of custody in this case, the probative value of the test results was so compromised a jury could not have reasonably concluded the forensic testing reliably established defendant was the source of the DNA in the sperm fraction sample. We are not persuaded.

On a claim of insufficient evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Thus, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably

justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

Under this standard, "'"[t]he test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.'" [Citation.] "'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]'" [Citation.] Reversal for insufficient evidence is warranted only where it clearly appears that upon no hypothesis whatever is there sufficient evidence to support a conviction. [Citations.]" (*People v. Ewing* (2016) 244 Cal.App.4th 359, 371.)

We have already concluded the trial court did not abuse its discretion in overruling defendant's foundational objection to the chain of custody of the forensic samples in this case. The gaps in the evidence chain were not so crucial as to make it as likely as not that the evidence analyzed at the crime lab in 2014 was not the same evidence originally taken from Gretchen and received at the crime lab from the FPD in 1995. Similarly, defendant's protestations to the contrary, there is no *showing,* nor even a nonspeculative reasonable suggestion, there was actual evidence tampering in this case. (See *Catlin, supra*, 26 Cal.4th at p. 134.) Therefore, Gustilo's testimony that, based on his analyses, the population frequency for the DNA profile he examined belonging to anyone other than defendant was a trillion to one is substantial evidence from which a jury could reasonably conclude defendant was the contributor of the sperm fraction found in Gretchen's vaginal swabs.

2. Defendant Forfeited His Challenge to the Admission of Gretchen's Statements to Her Daughter by Withdrawing His Hearsay Objection and Has Not Established His Counsel Was Ineffective in Doing So.

Because Gretchen died in 2007, her daughter Mary testified at trial to what her mother told her the night she was raped. Before trial, the court heard a motion regarding the admissibility of what Gretchen told Mary The discussion centered around whether her statements were hearsay admissible as spontaneous statements under Evidence Code section 1240.[3] In order to make its determination, the court took foundational testimony from Mary

After her testimony, defense counsel asked that nothing other than a basic statement "a man broke in and raped me" be allowed. He added: "And even those I object to under the confrontation clause of the 6th Amendment." The prosecutor argued for the admission of Gretchen's statements "a man had broken into [my] home, robbed [me] and raped [me], [I] drove him to the bank, gave him money, [and] dropped him off in a parking lot." The prosecutor also asked to admit Gretchen's statements to Mary that her assailant told her he had a gun, she felt threatened, and his description.

The trial court's initial ruling was to allow testimony that a man broke in, robbed and raped her, she drove him to the ATM, and gave him money. The court was unsure regarding any later statements. Following this tentative ruling, defense counsel stated "I withdraw my objection." The court inquired as to just what he was withdrawing, and counsel stated he was withdrawing his objection to Mary's testimony regarding what Gretchen had said during their initial phone conversation. The court

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[3] Evidence Code section 1240 codifies the long-standing exception to the hearsay rule for what California labels "spontaneous statements." It states: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

wanted further clarification as to which statements he was not objecting to, and asked "Are you talking about the conversation regarding the phone call to her daughter or which conversation?" Counsel answered: "Any of the conversation." The court asked "So even what [Mary] heard [after the initial phone call] at [Gretchen's] house? What she heard at the hospital?" Counsel confirmed "What she heard at the house and what she heard on the phone, correct."

The prosecutor said she was not going to ask about any statements Gretchen made at the hospital, so the court did not ask defense counsel for further illumination on that issue. The court's final ruling was, because counsel was not objecting to it, Mary could testify to everything her mother told her with the exception of what she may have overheard at the hospital.

Once in front of the jury, when the prosecutor asked Mary what Gretchen had told her on the phone, defense counsel made a hearsay objection, which was overruled. Following further testimony by Mary regarding what her mother had said counsel made several other objections, although none was on hearsay grounds.

At a sidebar conference, the court told defense counsel "I thought you said you were not objecting to what she had to say. Now I'm lost." Counsel replied, "I have to object. If this goes up for appellate review and I don't object on the record. . . ." The court interrupted, stating: "No. I misunderstood you. I thought you withdrew your objection entirely." Counsel clarified: "I withdrew my objection under [Evidence Code section] 1240." The court stated "Okay. Spontaneous statement exception?" and counsel replied "Correct."

"So when you're making [the nonhearsay objections], just give me clarification of what your thought process is," the court asked. Counsel stated: "Relevance. A lot of this testimony isn't relevant to a charge of burglary. I mean, what occurred after she was raped. I mean, it, the testimony that he broke in, obviously that would be relevant to burglary. [¶] That she was, any testimony about her being raped

would be relevant to the charge of rape. There's no allegation of robbery . . . [or] kidnapping . . . [or] anything like that."

The court overruled the relevancy objections, but asked for further clarification on the hearsay issue. "My biggest question was with the hearsay issues. . . . Are you now asserting the [Evidence Code section] 1240 objection or . . . you're still withdrawing that?" Counsel stated, "I made my objection based on the confrontation clause. . . . I still feel that all of this testimony is subject to the confrontation clause." The court asked: "Okay. You're objecting under the 6th Amendment, not under [Evidence Code section] 1240." Counsel responded "Yes."

Thus, while he initially raised an Evidence Code section 1240 objection, defense counsel withdrew that objection, and instead shifted to a Sixth Amendment claim. On appeal, defendant does not raise a Sixth Amendment claim.

Evidence Code section 353 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and *so stated as to make clear the specific ground of the objection or motion*. . . ." (Italics added.) "'In accordance with [Evid. Code, § 353], we have consistently held that the "defendant's failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable. [Citations.]'" (*People v. Partida* (2005) 37 Cal.4th 428, 433-434.)

Defendant argues he has not forfeited the claim because defense counsel was merely submitting to an erroneous ruling of the trial court, and cites *People v. Calio* (1986) 42 Cal.3d 639 (*Calio*), in support. We are not persuaded.

In *Calio,* before trial began, defense counsel questioned whether the defendant's prior burglaries constituted serious felonies since residential entry had not been established by those convictions. (*Calio, supra*, 42 Cal.3d at p. 642.) When the

trial court denied the defendant's motion to strike the priors, the defendant, on advice of counsel, admitted the prior convictions in order to avoid having those convictions proved to the jury. (*Ibid.*) The court remarked "[e]ven without an express reservation of the right to appeal, the defendant's admissions would not be binding if induced by judicial error," and quoted a 1955 Court of Appeal decision involving jury selection in a civil matter for the proposition "'[a]n attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.'" (*Id.* at p. 643.) Moreover, in *Calio* the trial court had "expressly reassured" the defendant he could raise the issue again on appeal. (*Ibid.*) Consequently, the court allowed the defendant to reraise the validity of his prior convictions on appeal. (*Id.* at p. 644.)

Here, however, defendant *withdrew* his Evidence Code section 1240 challenge in light of the trial court's *tentative* ruling. Thus, unlike the defense attorney in *Calio*, he did not merely submit to or acquiesce in the trial court's evidentiary ruling.

Defendant then reframes his challenge as a claim his trial counsel was ineffective for withdrawing the hearsay objection to Mary's testimony. We disagree.

"The decision whether to object to the admission of evidence is 'inherently tactical,' and a failure to object will rarely reflect deficient performance by counsel." (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335 (*Castaneda*); cf. *People v. Thompson* (2010) 49 Cal.4th 79, 122 ["[R]arely will an appellate record establish ineffective assistance of counsel"].) "If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 746 (*Ledesma*); *People v. Bess* (1984) 153 Cal.App.3d 1053, 1059 "'[A]ppellate court's inability to understand why counsel acted as he did

cannot be a basis for inferring that he was wrong'"].) Rather, "[a] claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 (*Mendoza Tello*).)

Here, defense counsel was aware Gretchen had told Mary her assailant was Hispanic, while defendant is African-American, and he had a clear tactical reason to having that particular statement before the jury. Nor could the prosecutor have objected to its admission. (Evid. Code, § 356.) While not deciding the issue, it may well be within the realm of tactical decisions for defense counsel to withdraw his hearsay objection for this reason. However, that is best resolved on habeas corpus review, not direct appeal.

Simply put, because he withdrew his hearsay objection to Mary's testimony about Gretchen's statements, defendant cannot now raise it on appeal. Similarly, on the record before us, defendant has not met his burden to show ineffective assistance of counsel.

3. Defendant Forfeited His Appellate Objection to Thompson's Testimony and His Counsel Was Not Ineffective for Failing to Object.

Defendant next contends the trial court prejudicially erred by allowing Thompson to testify to her conversation with Gretchen at the crime scene. In her attempt to obtain possible latent fingerprints, Thompson asked Gretchen to point out which window the man entered, and any areas he may have touched. She did. This, defendant now asserts, was inadmissible hearsay. Defendant acknowledges he did not object to this testimony below.

Defendant's newly minted hearsay challenge to Thompson's testimony is without merit since he failed to object to it below. (Evid. Code, § 353.) "Because he failed to make an appropriate [hearsay] objection, the issue is waived." (*People v. Bolin* (1998) 18 Cal.4th 297, 320; *People v. Abel* (2012) 53 Cal.4th 891, 924 ["A defendant

who fails to make a timely objection or motion to strike evidence may not later claim that the admission of the evidence was error"].)

Once more, defendant then reframes his claim as one alleging his trial counsel was ineffective for failing to object to these portions of Thompson's testimony. We repeat, "[t]he decision whether to object to the admission of evidence is 'inherently tactical,' and a failure to object will rarely reflect deficient performance by counsel." (*Castaneda, supra*, 51 Cal.4th at p. 1335.) Moreover, trial counsel is not ineffective for failing to make or pursue a meritless motion. (*People v. Weaver* (2001) 26 Cal.4th 876, 931; cf. *People v. Memro* (1995) 11 Cal.4th 786, 834 [The Sixth Amendment does not require counsel to waste the court's time with pointless motions].) "Defense counsel need not make futile objections or motions merely to create a record impregnable to attack for claimed inadequacy of counsel." (*People v. McCutcheon* (1986) 187 Cal.App.3d 552, 558-559.)

Furthermore, out-of-court statements not offered for their truth are not hearsay under California law (Evid. Code, § 1200, subd. (a)), nor do they run afoul of the confrontation clause. (See *Crawford v. Washington* (2004) 541 U.S. 36, 60, fn. 9 ["The Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"].) Gretchen's statements (and indicative behavior) to Thompson were admissible for the nonhearsay purpose of explaining why and where Thompson looked for additional crime scene evidence. Moreover, as the Attorney General points out, these marginally probative "statements" were merely cumulative to the much more probative statements Gretchen made to Mary as to what had happened to her. Moreover, none of these statements led Thompson to any physical evidence later evinced by the prosecution at trial. The exclusion of the basis for Thompson's explanation why she dusted certain areas for latent fingerprints, or why she collected a quilt and some of Gretchen's clothing, would not have made a different outcome a reasonable probability. (*Strickland v. Washington* (1984) 466 U.S. 668, 694

(*Strickland*) ["The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"].) This is especially true given the fact Thompson's efforts were futile and resulted in no evidence.

In any event, "[i]f the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*Ledesma, supra,* 39 Cal.4th at p. 746.) On the record before us, defendant has failed to demonstrate his trial counsel could have had no reason not to object to Thompson's testimony as to what Gretchen told her at the crime scene. Consequently, defendant's challenge must fail on direct appeal, and his ineffective assistance claim is one better raised on habeas corpus. (*Mendoza Tello, supra,* 15 Cal.4th at pp. 266-267.)

4. Defendant Forfeited His Prosecutorial Misconduct Claim and Has Not Established His Counsel Was Ineffective by Failing to Object.

A. Background

In her rebuttal argument, the prosecutor argued: "Let's talk about reasonable doubt, [CALCRIM No.] 220 in your packet. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. It is not a mere possible doubt. Everything relating to human affairs is open to some possible or imaginary doubt. [¶] So what does it mean? You've head the term a whole bunch of times now. Reasonable doubt is a sound sensible logical doubt based on the evidence in this case. [¶] Remember [during voir dire] we talked a little bit about 'hunt for doubt?' It's not a hunt for doubt, okay. You go ahead and talk about all of the evidence in this case, what's reasonable, what's not reasonable, and make a decision. [¶] If you have [a] doubt about the evidence in this case discuss it amongst each other and decide, do you have a sound, sensible, logical doubt based on the evidence in this case?"

During voir dire, when the prosecutor questioned a juror about what kind of evidence the juror would consider, such as consistent or inconsistent witness statements, one prospective juror indicated he or she would look for holes in a witness's story. The prosecutor later asked, "And you've heard the court talk about this standard of proof beyond a reasonable doubt. When you're looking at the standard of proof of beyond a reasonable doubt and finding holes in the story are you going to sit in the trial and look for holes?" The juror said, "I mean, I would. Yeah." The prosecutor responded, "Okay. Do you think that the standard beyond a reasonable doubt means you're suppose to, as a juror, hunt for doubt during the trial?" The juror said, "It's not my job, but I would be listening for it." The prosecutor followed up, "Okay. Do you think that you can set aside this notion of hunting for doubt and just listen to all the evidence and at the end make a decision 'do I have a reasonable doubt or not' based on all the facts and circumstances?" The juror responded affirmatively and the prosecutor asked all the jurors if anyone believed the "standard of proof beyond a reasonable doubt means I'm suppose to hunt for doubt."

After a juror answered he or she believed you looked at the totality of the circumstances, the prosecutor said, "Okay. So what I hear from you is I'm going to look at all the facts and circumstances, and then I'm going to make a decision whether there was proof beyond a reasonable doubt or not?" A juror said that was fair, and the prosecutor asked, "Does anybody disagree with that? Anybody think I'm here to look for doubt? I'm here to hunt for doubt in this case?"

When questioning other jurors, the prosecutor stated both sides have a right to a fair trial, and asked if anyone disagreed. She then asked, "Anybody think we're here to hunt for doubt in this case?" The juror being questioned said, "I don't think or personally I don't think I'm hunting for doubt. I'm just examining evidence presented in front of me and making a decision based on that . . . as it pertains to the law." The

prosecutor then asked, "Can you sit here and listen to all the evidence, and apply the law, and make a decision?" There were no defense objections to the prosecutor's voir dire.

In her closing argument, just before discussing the facts of the case, the prosecutor said: "Remember we talked in jury selection about 'we don't expect you to be robots,' okay. We ask can you to come in here, put prejudgment aside, right, and sit and listen with an open mind to all of the evidence before making a decision. And when making that decision you use your common sense and your life experience."

She later told the jurors, "And it's your job, you've already done it, sit and listen to the evidence. But it's your job to go back in the deliberation room, use your common sense and life experience to decide what's reasonable, and are these charges proven beyond a reasonable doubt?"

In her rebuttal argument, the prosecutor said, "And again, we talked about using your common sense and life experience. I can't tell you how to deliberate, how to do your job. What I can suggest is that you look at all of the facts and circumstances, all of the evidence in this case. You use your common sense and life experience to make logical conclusions. You decide what's reasonable, what's not reasonable, and you decide, guilty, not guilty."

Defendant claims the prosecutor committed prejudicial misconduct in these portions of her closing arguments, allegedly mischaracterizing the presumption of innocence and reasonable doubt. Again, however, the claim is not well taken because defendant failed to object to the prosecutor's argument and has therefore forfeited any such claim of error on appeal. In addition, he has not met his burden to show his counsel was ineffective by failing to object.

B. Defendant Forfeited His Prosecutorial Misconduct Claim

The law governing claims of prosecutorial misconduct is well established. Prosecutorial misconduct exists "'under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'"

(*People v. Earp* (1999) 20 Cal.4th 826, 858.) In more extreme cases, a defendant's federal due process rights can be violated when a prosecutor's improper remarks """"infect[] the trial with unfairness,""""" making it fundamentally unfair. (*Ibid.*)

Nevertheless, """[a]s a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."""" (*People v. Huggins* (2006) 38 Cal.4th 175, 251-252.) An exception to this rule provides "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).) Similarly, failure to request the jury be admonished does not forfeit the issue for appeal if """an admonition would not have cured the harm caused by the misconduct."""" (*Ibid*.)

Here defense counsel did not object to the prosecutor's arguments, and made no request the jury be admonished. Even though a failure to object will be excused if objection would have been futile or if an admonition would not have cured the harm (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*)), here defendant has not established an objection or admonition would have been futile. "A defendant claiming that one of these exceptions applies must find support for his or her claim in the record. [Citation.] The ritual incantation that an exception applies is not enough." (*People v. Panah* (2005) 35 Cal.4th 395, 462; *People v. Gray* (2005) 37 Cal.4th 168, 215 (*Gray*) [nothing in the record showed prosecutor engaged in """""a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process'""""""].)

Indeed, the alleged misconduct here consisted of the prosecutor's purported mischaracterizations of the meaning of reasonable doubt and the presumption of innocence, matters that could easily have been corrected by the trial court with an admonition. The trial court could have directed the jury to look to the law as stated in the

jury instructions rather than as argued by counsel, and to disregard counsel's statements to the extent they were contrary. (*Centeno, supra*, 60 Cal.4th at p. 674 ["[a] prosecutor's misstatements of law are generally curable by an admonition from the court"].)

Moreover, following closing arguments, here "the court properly instructed the jury on the standard of proof and we presume the jury followed the court's instruction. 'When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for "[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." [Citation.]' [Citation.]" (*People v. Otero* (2012) 210 Cal.App.4th 865, 873.)

Nonetheless, defendant insists an objection and admonition would have been futile in this case "because the misconduct was so egregious." In support, he cites *Hill, supra,* 17 Cal 4th 800. We are not persuaded.

In *Hill,* the defendant's attorney "was subjected to a constant barrage of [the prosecutor's] unethical conduct, including misstating the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods. With a few exceptions, all of [the prosecutor's] misconduct occurred in front of the jury. Her continual misconduct, coupled with the trial court's failure to rein in her excesses, created a trial atmosphere so poisonous that [defense counsel] was thrust upon the horns of a dilemma. On the one hand, he could continually object to [the prosecutor's] misconduct and risk repeatedly provoking the trial court's wrath, which took the form of comments before the jury suggesting [defense counsel] was an obstructionist, delaying the trial with 'meritless' objections. These comments from the bench ran an obvious risk of prejudicing the jury towards his client. On the other hand, [defense counsel] could decline to object, thereby forcing defendant to suffer the prejudice caused by [the prosecutor's] constant misconduct. *Under these unusual circumstances*, we conclude [defense counsel] must be excused from the legal obligation to continually object, state

the grounds of his objection, and ask the jury be admonished. On this record, we are convinced any additional attempts on his part to do so would have been futile and counterproductive to his client." (*Hill, supra*, 17 Cal.4th at p. 821, italics added.)

Here, there are no similar "unusual circumstances." Defendant does not assert the prosecutor attacked defense counsel, propounded "outright falsehoods," or misstated the evidence. Nor does defendant claim the trial judge allowed the prosecutor's misconduct to occur, or was so hostile to defense counsel that he ran a risk of further dressing down in front of the jury. Indeed, the record before us belies such claims, and defendant fails to point us to anywhere the prosecutor engaged in "'"a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process."'" (*Gray, supra*, 37 Cal.4th at p. 215.) "Nothing in this record indicates that an objection would have been futile. Nor was the prosecutor's argument so extreme or pervasive that a prompt objection and admonition would not have cured the harm." (*Centeno, supra*, 60 Cal.4th at p. 674.) We therefore conclude defendant may not pursue his claim of prosecutorial misconduct on appeal because the issue has been forfeited. (*Ibid.*)

C. Defendant Has Not Established Defense Counsel Was Constitutionally Ineffective for Failing to Object to Portions of the Prosecutor's Closing Argument.

Defendant alternatively maintains if we find his prosecutorial misconduct claim forfeited, then his counsel's failure to object amounted to a denial of his right to the effective assistance of counsel. We also reject this contention.

It is true "[a] defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel. The appellate record, however, rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus,

which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.)

Again, a defendant claiming ineffective assistance of counsel has the burden to *show*, not merely allege, counsel's performance was prejudicially deficient. (*People v. Johnson* (2015) 60 Cal.4th 966, 979–980.) Deficient performance is assessed under an objective standard of professional reasonableness and prejudice by a test of a reasonable probability—not possibility—of an adverse effect on the outcome. (*Strickland, supra,* 466 U.S. at pp. 668, 687–688, 694.) "'Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy."' [Citation.]" (*Centeno, supra,* 60 Cal.4th at pp. 674-675.)

"Failure to object rarely constitutes constitutionally ineffective legal representation. . . ." (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) Moreover, as emphasized above, "[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.)

"[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one" (*People v. Padilla* (1995) 11 Cal.4th 891, 942), and "a mere failure to object to evidence or argument seldom establishes counsel's incompetence." (*People v. Ghent* (1987) 43 Cal.3d 739, 772; see *People v. Kelly* (1992) 1 Cal.4th 495, 540 [an attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel]; *People v. Milner* (1988) 45 Cal.3d 227, 245 [finding no ineffective assistance of counsel where even if one or more of prosecutor's statements were improper, none of them took up more than a few lines of the lengthy closing argument, and counsel would

have acted well within the bounds of reasonable competence had he chosen to ignore the statements rather than draw attention to them with an objection].)

Put simply, defendant has asserted prejudicial error but has not satisfied either prong of the test requiring him to show his trial counsel was constitutionally ineffective for failing to object to portions of the prosecutor's closing argument.

5. No Instructional Error Affected Defendant's Substantial Rights, and His Failure to Object to the Jury Instructions in this Case Forfeited Any Appellate Claim of Error.

Defendant next argues the trial court erred in instructing the jury with CALCRIM No. 1190, which states: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone." He argues this was improper because: (1) Gretchen did not testify, so it was inapplicable; (2) it misstated the law because the prosecution was also required to prove the tolling of the statute of limitations; (3) the court failed to define the term "complaining witness"; and (4) when combined with CALCRIM No. 301,[4] also given to the jury, the erroneous implication was the jury need not scrutinize Mary's testimony as closely as any other witness' testimony.

Defendant failed to object to either jury instruction, singly or together. Indeed, the trial court specifically asked defense counsel whether he approved giving CALCRIM 1190, and he answered "Yes." Similarly, when asked whether he approved of giving CALCRIM No. 301 in conjunction with CALCRIM 1190, defense counsel expressed he had no opposition. Consequently, both instructions were given to the jury.

Section 1259 provides that an "appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, *if the substantial rights of the defendant were affected thereby*." (Italics added.) Thus, "the failure to object to an instruction in the trial court waives any claim of

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[4] CALCRIM No. 301 states: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

error unless the claimed error affected the substantial rights of the defendant, i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim. . . ." (*Ibid.*) Accordingly, we review defendant's instructional error claim but because we conclude the instructions did not affect defendant's substantial rights, this claim lacks merit *and* was forfeited.

Claims of instructional error are examined based on a review of the instructions as a whole and in light of the entire record. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 (*Estelle*); *People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) "We . . . examine defendant's contentions in turn, guided by the standard for reviewing claims of ambiguous jury instructions, i.e., 'whether there is a reasonable likelihood that the jury misconstrued or misapplied the words' of the instruction. [Citations.] Moreover, '[i]t is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.] '[T]he fact that each instruction does not cover the whole case[] does not make such instruction erroneous, if the instructions, as a whole, did so . . . .' [Citation.]" (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1491.)

Defendant first asserts CALCRIM No. 1190 should not have been given because Gretchen did not testify. Strictly speaking, this is true because Gretchen was unavailable to testify at trial as she was deceased. Nevertheless, Gretchen's contemporaneous statements regarding what happened to her that night in 1995 were admitted into evidence and established the elements of the crime with which defendant was charged, albeit not the identity of the perpetrator. In other words, as relayed through Mary's trial testimony, Gretchen's statements were necessary for defendant's conviction.

"Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." (*Boyde v. California* (1990) 494 U.S. 370, 380-381.) Thus, while it may have been preferable for the trial court to modify CALCRIM 1190 to reflect the fact Gretchen's statements were the functional equivalents of her "testimony," when viewed in context and in conjunction with the other instructions, there is no "reasonable likelihood that the jury misconstrued or misapplied the words [of the instruction]." (*People v. Clair* (1992) 2 Cal.4th 629, 663 (*Clair*); *Estelle, supra,* 502 U.S. at p. 72.)

Defendant next claims the trial court erred by not defining the term "complaining witness" for the jury. He did not raise the issue below or ask the trial court for a special instruction containing such a definition. Nonetheless, he now argues that without such a definition, the jury likely believed the "complaining witness" referenced in CALCRIM No. 1190 was Mary, and not Gretchen, since it was she who testified at trial. We are not persuaded.

A trial court has a sua sponte duty to instruct the jury on the definition of terms used in its instructions having a "'technical meaning peculiar to the law.'" (*People v. Howard* (1988) 44 Cal.3d 375, 408.) A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that differs from its nonlegal meaning. As the court explained in *People v. Richie* (1994) 28 Cal.App.4th 1347, 1360, terms are held to require clarification by the trial court only when their statutory definition differs from the meaning that might be ascribed to the same terms in "common parlance."

Conversely, there is no sua sponte duty to clarify, amplify, or otherwise instruct on commonly understood words or terms used in statutes or jury instructions.

When a word or phrase "'"'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning *in the absence of a request*.'"'" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1022-1023, italics added.) Here, there was no such request.

Moreover, the jury was instructed: "Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. . . . Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings." (CALCRIM No. 200.)

Defendant proffers no "technical" definition of the term "complaining witness," nor does he cite authority for the proposition it carries any special technical meaning. "'A defendant challenging an instruction as being subject to erroneous interpretation by the jury must *demonstrate* a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]' [Citation.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 822, italics added.) Here, defendant does not demonstrate that likelihood, and instead summarily asserts the jury must have been confused whether "complaining witness" referred to Gretchen or her daughter Mary Nothing in this record suggests there was any possible confusion.

In common parlance, the phrase "complaining witness" in a criminal case is the victim. Indeed, since the term "victim" is somewhat suggestive to the extent it connotes a crime has actually been committed, "complaining witness" is more neutral and less evocative.[5]

The fact Gretchen's statements were communicated to the jury through her daughter does not change the fact Gretchen was the underlying declarant. Her statements were the functional equivalents of her live testimony and therefore comprised the

[5] We express no opinion about the use of the somewhat outdated term "prosecutrix" to describe a sexual assault victim.

evidence establishing the underlying crime. (Cf. *Melendez Diaz, supra*, 557 U.S. at pp. 310-311 [for confrontation clause purposes, lab analysts' hearsay declarations in lieu of their direct testimony "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination'"].) We are confident the jury in this case was not confused as to who the "complaining witness" was.

Defendant next argues the instruction misstated the law because Gretchen's statements were in fact not sufficient to convict him because the prosecution was also required to prove the statute of limitations had been tolled. This argument conflates two distinct aspects of the case. By its terms, CALCRIM No. 1190 focuses on the fact the prosecution can prove "a sexual assault crime" has occurred "based on the testimony of a complaining witness alone." The question whether Gretchen was raped, i.e., a sexual assault crime has occurred, is a separate question from whether the rape is *prosecutable* under the relevant statutes of limitations. The latter question is wholly independent from the first. Thus, the trial court instructed the jury that "[t]o prove that the defendant is guilty of [rape by force]" four elements were required, and listed them. But the jury also received a separate instruction: "*If* you find defendant guilty of [rape] you must *then* decide whether the People have proved the additional allegation that the statute of limitations was tolled. . . ." (Italics added.) Hence, the jury was told if they found defendant guilty of rape, i.e., "convicted" him of rape, then and only then were they to proceed to make the additional determination regarding the tolling of the statute of limitations. CALCRIM No. 1190 does not misstate the law.

Finally, defendant insists when CALCRIM Nos. 301 and 1190 are given together, it tells the jury it need not scrutinize Gretchen's statements as closely as any

other witness. This argument was rejected by our Supreme Court in its analysis of the pre-CALCRIM instructions found in CALJIC Nos. 2.27 and 10.60.[6]

Thus, in *People v. Gammage* (1992) 2 Cal.4th 693 (*Gammage*), the court concluded an instruction that the testimony of a single witness is sufficient may properly be given in conjunction with an instruction there is no corroboration requirement in a sex offense case. This is exactly what CALCRIM Nos. 301 and 1190 do. Because both instructions correctly state the law, and each focuses on a different legal point, there is no implication that the victim's testimony is more credible than other testimony. (*Gammage*, at pp. 700-702.)

Defendant acknowledges *Gammage* but argues we should reject it because its underlying basis is "outdated." Whether or not our Supreme Court's 1992 opinion is anachronistic, however, is not for us to assess. We decline his invitation to decide otherwise. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Consequently, "[c]ontrary to appellant's contention, [CALCRIM Nos. 301 and 1190], when viewed in context, do not elevate the credibility of the victim witness or that of other witnesses. It is settled that the giving of both instructions is appropriate. [Citation.]" (*People v. Adames* (1997) 54 Cal.App.4th 198, 210.)

Defendant's allegations of instructional error fail on the merits, and as such his substantial rights were not affected. (*Clair*, *supra*, 2 Cal.4th at p. 663.) And since we find defendant's claim fails on the merits, it was also forfeited by his failure to object. (§ 1259.)

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[6] CALJIC No. 10.60 states: "It is not essential to a finding of guilt on a charge of rape . . . that the testimony of the witness with whom sexual relations is alleged to have been committed be corroborated by other evidence." Similarly, CALJIC No. 2.27 provides: "You should give the uncorroborated testimony of a single witness whatever weight you think it deserves. Testimony concerning any fact by one witness, which you believe, whose testimony about that fact does not require corroboration is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends."

6. There Was No Cumulative Error

In his penultimate claim, defendant contends he was denied his right to a fair trial due to the cumulative effect of the purported evidentiary errors and prosecutorial misconduct. The "'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.'" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Because we have rejected defendant's individual claims of error, or found them forfeited, there is no error to cumulate, and his claim of cumulative error also fails. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316; cf. *People v. Seaton* (2001) 26 Cal.4th 598, 692.)

7. Defendant's Nevada "Prior" Strikes Are Not Prior Convictions.

Defendant's final claim is the true findings on his three prior strike convictions from the State of Nevada must be stricken. He posits several reasons why, but we need only address one: All three Nevada convictions occurred *after* the conduct in this case, so they are by definition not *prior* convictions.[7] (*People v. Flood* (2003) 108 Cal.App.4th 504, 507; cf. *People v. Huynh* (2014) 227 Cal.App.4th 1210, 1214 [prior conviction for certain sex crimes must precede current offense].) The Attorney General concedes the issue and we accept his concession.

Defendant argues the case must be remanded to the trial court for resentencing because he is now facing only three strike priors, not six. We reject this contention. On the record before us there is no reasonable likelihood the trial court would change its sentencing choice were we to remand:

"[The Court]: [T]he court is sentencing [defendant] to [45 years to life] *as opposed to striking or removing any of the priors* because this crime did have great bodily injury. [¶] You raped a 70-plus-year-old woman who had never, from what I can tell, done anything to deserve any kind of mistreatment much less to be raped in her own home. [¶] She, even from your own statements that I got during the trial, and that we

[7] Defendant's Nevada convictions were in 2006, 2005, and 1998. Gretchen was raped in 1995.

hear now back from her family, she appears to have been nothing but gracious to you even in that environment. [¶] . . . So, unfortunately you obviously just went above and beyond anything that was necessary for a burglary, and you violated this woman. [¶] You know, it could be anyone's mother at that age, including your own, and there's no good way to put this. There is no—it's hard to have any compassion for somebody who is raping a 70 year old to be quite frank. It's a vicious crime. And no woman or man deserves to be raped, but certainly not elderly women do not deserve to be raped. It's very sad. [¶] The court does look at the aggravating factors with regard to, as I just stated, the case, but also then to your conduct. [¶] The violent conduct does indicate a serious danger to our society. [¶] Your prior convictions are numerous. I've already recited just those that were either strikes or prison priors, and I don't need to recite those again, but the court has considered all of those and those histories. [¶] It does appear you would have been on probation or parole at the time you did commit this offense as a result of the '94 case out of Los Angeles, and your progress on probation or parole, as I've stated, in my review of the [prison priors] shows that you really were not out of custody for very long at any given time. [¶] . . . So for all those reasons, the court does find that this is an appropriate sentence." (Italics added.)

The trial court unequivocally indicated it would not exercise its discretion to "strik[e] or remov[e] any of the priors," and that its imposition of the maximum sentence was appropriate. Under these circumstances, no purpose would be served in remanding for reconsideration. Moreover, in light of defendant's record and the facts of the present offense, imposition of a 45-years-to-life term is not only still permitted under the Three Strikes law, but was and is well within the trial court's sentencing discretion. (Cf. *People v. Gutierrez* (1996) 48 Cal.Appp.4th 1894, 1896.)

DISPOSITION

The true findings on the three Nevada prior strike convictions are stricken. In all other aspects, the judgment is affirmed. The superior court clerk is ordered to

prepare an amended abstract of judgment reflecting these changes and forward it to the Department of Corrections and Rehabilitation.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.